

Case No. VBD-0063

August 14, 2001

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Motion for Discovery

Name of Petitioner: Bruce R. Field

Date of Filing: August 2, 2001

Case Number: VBD-0063

This determination will consider a Motion for Discovery filed with the Office of Hearings and Appeals (OHA) by Bruce R. Field (Field). This Motion, dated August 2, 2001, concerns the hearing requested by Field under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708 (Part 708). Field requested this hearing on April 24, 2001 (Case No. VBH-0063) in connection with the Part 708 complaint he filed against the management and operating contractor, Midwest Research Institute (MRI) for the National Renewable Energy Laboratory (NREL).(1)

I. Background

Field's complaint arises from his employment at NREL as a Project Manager. During the period 1994 to April 2000, Mr. Field had a strained relationship with his direct supervisor Michael Glaser (Glaser), a Group Manager in Site Operations. In early April 2000, the two differed over a choice of contractor on pending construction contracts. This dispute led to Glaser allegedly sending a derogatory item of electronic mail to one of Field's engineers, Ray Jukkola (Jukkola), and later berating Jukkola in Jukkola's office. Glaser then personally solicited another contractor to perform the contract.

On April 21, 2000, Field and Glaser argued over the choice of a contractor for another project. This dispute resulted in an exchange of electronic mail which culminated in Glaser allegedly questioning Field's professional competence in selecting contractors. Field then sent an electronic mail to Glaser, the NREL Legal Office and the acting Human Resources Director charging that Glaser's remarks concerning Field's integrity and ethics were slanderous. Later in the day, when Field entered the NREL building where Glaser works, Field alleges that Glaser followed and confronted him in a manner Field believed was physically threatening. Field then obtained a Temporary Restraining Order (TRO) against Glaser from a County Court. On April 24, 2000, Field sent a memorandum to the NREL Legal Office detailing the confrontation with Glaser and explaining that Field believed that he had to get the TRO because Field's prior complaints to NREL had been unavailing.

In May 2000, Field sent three items of electronic mail to NREL officials alleging waste, fraud, and abuse on the part of Glaser and his supervisor, John Shaffer. NREL then turned over Field's messages and its files to the DOE Office of the Inspector General (IG) for investigation. IG took no action regarding Field's complaints. NREL also retained an outside investigator to examine the circumstances leading to the conflict between Field and Glaser. The investigator concluded that he found no basis for Field's claim that Glaser presented a physical threat to Field. The investigator also concluded that the working relationship between Field and Glaser was beyond retrieval. Subsequently, in a June 27, 2000 hearing, the County

Court denied Field's request for a Permanent Restraining Order (PRO), concluding that there was no imminent threat of serious injury, harassment, or molestation.

In July 2000, NREL decided to remove Field from his position in Site Operations and to move him to a temporary 60-day position. Afterwards, Field was then moved to another 60-day position. In November 2000, Field was then offered a permanent position in the Science and Technology Directorate at NREL.

Field then filed the Part 708 complaint which underlies this Motion. After conducting an investigation, the Department of Energy's Office of Hearings and Appeals issued a Report of Investigation (Report) on April 24, 2001. The OHA Investigator found that Field did make several protected disclosures and that the disclosures were a contributing factor in Field's transfer out of NREL Site Operations. However, the OHA Investigator concluded, based upon the facts available to him, that NREL would have transferred Field notwithstanding his disclosures.

In preparation for the hearing, Field has propounded to NREL a number of Interrogatories and Request for the Production of Documents. NREL responded. After receiving that response, Field has filed a request with me (which I deemed a Motion for Discovery) asking that I order NREL to provide fuller disclosure of information and documents concerning certain discovery items. These items are detailed below.

II. Analysis

The issuance of discovery orders in proceedings under Part 708 is within the discretion of the Hearing Officer. 10 C.F.R. § 708.28(b)(1). The regulations lay out the types of discovery that can be ordered. See 10 C.F.R. § 708.28(b). The regulations grant the Hearing Officer authority to arrange for the issuance of subpoenas for witnesses to attend the hearing on behalf of either party, or for the production of specific documents or other physical evidence, provided a showing is made that the requested discovery is "designed to produce evidence regarding a matter, not privileged, that is relevant to the subject matter of the complaint." 10 C.F.R. § 708.28(b)(1).

Arrangements for pre-hearing discovery are usually worked out between the parties, without the need of a formal discovery order from the OHA Hearing Officer. However, the OHA is prepared to issue a discovery order if necessary to ensure compliance with any reasonable discovery request. Since there are material disputes regarding Field's discovery request, I will consider those disputes in this Decision. In my discussion below, I will address Field's complaints concerning NREL's responses to various discovery items.

A. Interrogatory No. 1 and Requests for Documents Nos. 2, 3, 4 and 10

Interrogatory No. 1 requests that NREL submit information regarding individuals who have filed complaints against Shaffer and Glaser. Requests for Documents Nos. 2 and 3 request copies of Glaser's and Shaffer's personnel files, respectively. Request for Documents No. 4 asks for copies of all documents relating to disciplinary actions taken against Glaser and Shaffer. Request for Document No. 10 requests copies of all documents relating to any and all complaints asserted by any employees of NREL against Shaffer and Glaser.

In this case, to support his complaint, Field must establish by a preponderance of the evidence that he made a protected disclosure(s) (concerning fraud, gross mismanagement, gross waste of funds or abuse of authority) and that his disclosures were a contributing factor in NREL's alleged retaliation against him. See 10 C.F.R. § 708.5; 10 C.F.R. § 708.29. If Field meets this burden, the NREL must prove by clear and convincing evidence that it would have transferred Field, his April and May 2000 disclosures notwithstanding. 10 C.F.R. § 708.29. According to the Report of Investigation, NREL chose to transfer Field instead of moving the management team of Shaffer and Glaser.

Evidence concerning complaints and disciplinary actions taken against Shaffer and Glaser might be relevant in considering whether it was reasonable for NREL to retain Shaffer and Glaser. It thus would affect the issue of whether NREL would have transferred Field in the absence of his disclosures. These are both relevant inquiries. Consequently, I will grant, in part, Field's request with regard to Interrogatory No. 1 and Requests for Documents Nos. 2, 3, 4 and 10. NREL shall provide information or documents related to complaints NREL has received, or disciplinary actions NREL has taken, against Shaffer and Glaser. See 10 C.F.R. § 708.28(b)(1).

B. Interrogatories Nos. 4, 5, 6 and 7

Interrogatories Nos. 4, 5, and 6 request information concerning various complaints Field made against Shaffer or Glaser in 1994, 1996 and 2000. Specifically, Field requests that NREL identify all actions taken in response to those complaints along with the names and other related information concerning all NREL employees acting on its behalf with respect to those complaints. As indicated in the Report of Investigation, Field alleged that he had submitted complaints in 1994 and 1996 concerning incidents where Glaser lost his temper with Field, yelled profanities, and questioned Field's professional competence. Report of Investigation at 3. In January 2000, Shaffer reportedly lost his temper with Field and ordered him out of his office. *Id.* For the reasons articulated above in Section A, NREL should comply, to the extent it has information, with Interrogatories Nos. 4, 5, and 6.

Interrogatory No. 7 requests that NREL identify all actions it undertook in response to Field's complaint concerning the April 21, 2000 incident, along with information concerning the NREL officials who undertook the actions. In my review of the relevant document, NREL appears to have responded to Interrogatory No. 7.

C. Interrogatory No. 9

Interrogatory No. 9 requests that if NREL contends that any employment decision concerning Mr. Field was in any way related to Field's performance, NREL should identify each such decision along with the perceived problem in Field's performance. This request is overbroad since not all employment decisions regarding Field would be relevant for purposes of his present Part 708 complaint. Only NREL employment decisions concerning Field made after his alleged disclosures would be relevant. In its response the Discovery Motion, NREL has stated that Field's transfer to the two temporary assignments and to his current permanent position (the retaliatory actions Field alleges NREL made against him in response to his April and May 2000 disclosures) were not motivated by performance problems. I deem this response to be adequate with regard to Interrogatory No. 9.

D. Interrogatories Nos. 10 and 11 and Requests for Production Nos. 8 and 9

These discovery items relate to salary and compensation information concerning various specific job positions at NREL. I have decided to bifurcate the hearing in this matter. I will first conduct a hearing on the merits now scheduled for August 29 and 30, 2001. If Field prevails on the merits of his Part 708 complaint, I will allow the parties to conduct discovery and make submission concerning damages to Field. Consequently, I will defer ruling regarding these discovery items.

E. Interrogatory No. 15

Interrogatory No. 15 requests that NREL identify all communications relating to any leave of absence taken by Glaser and "his impending departure from NREL." Field asserts this information is relevant given NREL's claim in the Part 708 investigation that removing Glaser would be potentially disruptive and whether Glaser provided NREL information supporting Field's position that Glaser was volatile and threatening. Nevertheless, I do not find that this Interrogatory would produce relevant evidence. The Report of Investigation states that NREL managers believed that the only alternative to removing Field

was to remove the Site Operation management team of Shaffer and Glaser. The fact that Glaser may have left subsequent to the decision to transfer Field does not provide relevant evidence concerning the NREL decision not to remove Shaffer and Glaser at the time Field made his complaint. Field's assertion that such leave of absence communications might contain admissions from Glaser is too speculative. Consequently, NREL need not respond to Interrogatory No. 15.

F. Request for Production No. 11

Request for Production No. 11 asks for information relating to communications between the parties concerning Field's Part 708 complaint. In its response to Field's Motion for Discovery, NREL stated that Field's Motion for Discovery has clarified the fact that Field seeks copies of communications between the parties pertaining to Field's Part 708 complaint. NREL has agreed to produce these documents for inspection and photocopying. Consequently, I will postpone further consideration of this issue.

G. Request for Production No. 14

Request for Production No. 14 asks for documents relating to any investigation made by NREL or its agents or representatives in response to complaints asserted by Mr. Field and other NREL employees against Glaser or Shaffer. For the reasons stated in Section A, NREL should comply with Request for Production No. 14.

It Is Therefore Ordered That:

(1) The Motion for Discovery filed by Bruce R. Field, Case No. VBD-0063, is hereby granted in part as described in the foregoing decision.

(2) This is an Interlocutory Order of the Department of Energy. This Order may be appealed to the Director of OHA upon issuance of a decision by the Hearing Officer on the merits of the complaint.

Richard A. Cronin, Jr.

Hearing Officer

Office of Hearings and Appeals

Date: August 14, 2001

(1) In this Decision, I will refer to MRI as NREL.